## RECENT CASES.

APPEAL AND ERROR—DISPOSITION OF CAUSE—REVERSAL—AMOUNT OF DAMAGES—In an action to recover compensation for damage done to land by a flood, the lower court dismissed the action. On the appeal it was argued that even if the plaintiff had made out a *prima facie* case he was not entitled to have the order reversed because he had failed to prove any damage. *Held:* Though there was no proof of the amount of the damages because of a misconception of the measure, as the evidence showed substantial damages a new trial should be ordered. Erickson v. Minnesota & Ontario Power Company, 158 N. W. 979 (Minn. 1916).

This case represents one of the limitations to the general rule that a judgment will not be reversed and a new trial granted simply to permit the recovery of nominal damages. Thisler v. Hopkins, 85 Ill. App. 207 (1889); Lyons v. Smith, 36 App. Div. 627 (N. Y. 1898); McLean v. Charles Wright Medicine Co., 56 N. W. 68 (Mich. 1893). The general rule which has its basis in the doctrine of *de mumnis non curat lex* will not be followed where as in the principal case the evidence shows that substantial injury has been suffered or where there has been a positive and wrongful invasion of another's rights. Ashby v. White, 2d Ld. Raym. 938 (1703); Wartman v. Swindell, 18 L. R. A. 44 (N. J. 1892); Thomson-Houston Elect. Co. v. Durant Land Co., 144 N. Y. 34 (1894); Harvey v. Mason City & Fort Dodge R. R. Co., 105 N. W. 958 (Iowa 1906).

In cases where a judgment for nominal damages would carry the costs, a new trial will be granted. Chambers v. Frazier, 29 Ohio St. 362 (1876); Middleton v. Jerdee, 73 Wis. 39 (1888). It has been held, also, that while a court would refuse to reverse a judgment denying a new trial simply to allow a plaintiff an opportunity to recover nominal damages, such a rule would not be applied to the granting of a nonsuit when the plaintiff was entitled to recover nominal damages. Bloom v. Americus Grocery Co., 43 S. E. 54 (Ga. 1902). The failure of a jury, however, to award nominal damages in an action of libel *per se* is not ground for reversal. Fink v. Evening Post Pub. Co., 40 N. E. 292 (N. Y. 1897); Tracey v. Hackett, 49 N. E. 185 (Ind. 1898). But see *contra,* Von Schoeder v. Spreckels, 147 Cal. 186 (1905).

ATTORNEY AND CLIENT—FEES—SETTLEMENT OF LITIGATION BY CLIENT—An attorney was retained to prosecute a suit for a contingent fee. After the client had compromised with his opponent, without the attorney's consent, the attorney sued for the contract price. *Held:* The attorney cannot recover upon the express contract, though that will not bar recovery, on a *quantum merut,* for the value of services rendered before the settlement. Southworth *et al.* v. Rosendahl, 158 N. W. Rep. 717 (1916).

Where the compensation depends on the success of the attorney, and the client, in good faith, settles with his adversary, in the opinion of some courts, the attorney is confined to a recovery of the reasonable value of the services to the time of the settlement, Quint v. Opher Silver Min. Co., 4 Nev. 304 (1868); Western Union Tel. Co. v. Semmes, 73 Md. 9 (1890); Harris v. Root, 28 Mont. 159 (1903), even though there is a provision that

the client shall not compromise without the attorney's consent. It has been held that the attorney cannot recover the specified sum under the contract, Western Union Tel. Co. v. Semmes, 73 Md. 9 (1890); Harris v. Root, *supra*, for it is invalid. He cannot be compelled to accept the contingent fee, but may sue in *quantum meruit*. Duke v. Harper, 8 Mo. App. 296 (1880). But if the contract fixes the amount which the attorney is to receive in case of settlement, with or without his consent, he can recover on that contract. Elliott v. Rubel, 132 Ill. 9 (1890).

Another line of cases holds that, if the client has thus compromised, the attorney may recover the compensation as agreed in the contract, just as if he had succeeded in the suit, the theory being that the client has prevented performance and thereby waived it. Hill v. Cunningham, 25 Tex. 25 (1860); Millard v. Jordan, 76 Mich. 131 (1889); Bogert v. Adams, 8 Colo. App. 185 (1896). In those states, where a provision that a client shall not compromise a suit is valid, the attorney can recover the contract price. Ryan v. Martin, 16 Wis. 59 (1862); Hoffman v. Vallejo, 45 Cal. 564 (1872).

ATTORNEY AND CLIENT—SCOPE OF AUTHORITY—A county moved to set aside a verdict founded on an agreed statement of facts signed by the county attorney, on the ground that it amounted to a confession of judgment, and was therefore outside the attorney's authority. *Held:* The signing was within the agent's implied authority. Christy v. Atchison T. & S. F. R. R., 233 Fed. 255 (Col. 1916).

The weight of authority is that an attorney can confess judgment and the client is bound. Franigan v. Philadelphia, 51 Pa. 491 (1866); Thompson v. Pershing, 86 Ind. 303 (1882); Hollenbeck v. Glover, 128 Ga. 52 (1907). *Contra:* Price v. Logue, 164 S. W. 1048 (Texas 1914); Kilmer v. Gallaher, 112 Iowa 583 (1900). When the confession is made because of the attorney's personal malice, it is not binding, Nichells v. Nichells, 5 N. D. 125 (1895), nor when made on behalf of infant clients, the attorney at the same time representing adverse interests. Walker v. Grayson, 86 Va. 337 (1889).

In general, the authority of counsel extends to all customary incidents of litigation short of a compromise of client's claim, Combs v. Combs, 105 N. E. 944 (Ind. 1914), and the client cannot interfere. Board of Commissioners v. Younger, 29 Cal. 147 (1865). The attorney may do all the mechanical acts of litigation, Wright v. Parks, 10 Iowa 342 (1860); Bingham v. Board of Supervisors, 6 Minn. 136 (1861); Lacoste v. Eastland, 117 Cal. 673 (1897), waive technicalities, Hefferman v. Burt, 7 Iowa 320, submit to a nonsuit, Lynch v. Cowell, 12 L. T. 548 (1865), or admit facts for the purposes of trial. U. S. to use Lyman Coal Co. v. U. S. Fidelity and Guaranty Co., 83 Vt. 278 (1910).

It is not part of an attorney's implied authority to accept service of original process, Reed v. Reed, 19 S. C. 548 (1883), when to do so will bring his client within the jurisdiction of the court, nor to stipulate that the dismissal of an action shall bar an action for malicious prosecution, Marbourg v. Smith, 11 Kan. 544 (1873), nor to stipulate not to appeal, Keoughan v. Equitable Oil Co., 116 La. 773 (1906), nor to release the

property of the defendant from a judgment lien, Phillips v. Dobbins, 56 Ga. 617 (1876), nor to appeal the case, Hooker v. Brandon, 75 Wis. 8 (1889), nor to submit matter to arbitration without a rule of court. Markley v. Amos, 8 Rich. 468 (S. C. 1832).

As counsel has control of the remedy, he has implied authority to issue execution on the judgment, Bank of Georgetown v. Geary, 30 U. S. 99 (D. C. 1831), and to cause the defendant to be confined in jail. Hyam v. Michel, 3 Rich. Law 303 (S. C. 1832). His implied powers extend to vacating a judgment which is pending on appeal. Quin v. Doyd, 30 N. Y. Super. 538 (1868). After judgment and during the time that a writ of error can be sued out, he can stipulate that the judgment in his suit shall abide the decision of another suit involving the same questions and tried by the same attorneys. Brown v. Arnold, 131 Fed. 723 (Mo. 1904).

Counsel cannot delegate his discretionary powers, Eggleston v. Boardman, 37 Mich. 14 (1877), nor employ other counsel to aid him without express authority, Emblem v. Bicksler, 34 Colo. 496 (1905), but he can delegate ministerial duties and bind his client to pay. McEwen v. Mazyck and Bell, 3 Rich. L. 210 (S. C. 1889).

Notice to the attorney is notice to the client, Sweeney v. Pratt, 70 Conn. 274 (1897); Mitchell v. Morgan, 165 S. W. 883 (Texas 1914), and an attorney's admission as such binds the client. Pratt v. Conway, 148 Mo. 291 (1899); Citizens Savings Bank v. Fitchburg Fire Ins. Co., 86 Atl. 1056 (Vt. 1913). He can receive payment of a judgment, Carrol County v. Cheatham, 48 Mo. 385 (1871).

CONFLICT OF LAWS—USURY—CONTRACTS SECURED ON LAND—A borrower of money executed notes, payable in Illinois at the rate of 8 per cent., secured under provisions of the Georgia code relative to deeds to secure debts in that state, the security deed stipulating that it should be a Georgia contract. *Held:* The interest laws of Georgia applied. Harvard v. Davis, 89 S. E. 740 (Ga. 1916).

Most courts are agreed that as to contracts made in one place to be performed in another, the *lex loci solutionis* governs. Miller v. Tiffany, 1 Wallace 310 (U. S. 1863); Ringer v. Virgin Timber Co., 213 Fed. 1002 (1914); Gold Stabeck Loan & Credit Co. v. Kinney, 157 N. W. 482 (N. D. 1916). Nevertheless, it has always been the rule that parties may contract with a view to the law of a particular state, Peck v. Mayo, 14 Vt. 33 (1842); Jenkins v. Union Savings Ass'n, 155 N. W. 765 (Minn. 1916); and it was on this basis that the principal case was decided.

Where a loan is secured by land, the *locus rei sitae* is the place of performance within the rule, in the absence of provisions as to the place of payment, First National Bank v. Rambo, 85 S. E. 840 (Ga. 1915), but where the land is situated in one state and payment is to be made in another, the laws of the jurisdiction where payment is to be made, control. Ringer v. Virgin Timber Co. and Jenkins v. Union Saving Ass'n, *supra.*

CONTRACTS—ILLEGAL CONSIDERATION—In an action by a justice of the peace to collect costs, the defendant set up an agreement made with the justice who entered up the judgments, which provided that the costs, in case

a recovery was had, were to be collected at all events, from the other party to the judgment. *Held:* That the contract was illegal and void, being opposed to public policy, and the due administration of justice. Southern Bell Telephone and Telegraph Co. v. Mitchell, 89 S. E. 514 (Georgia 1916).

It is a well settled rule that any contract by one acting in a public capacity which restricts the free exercise of a discretion vested in him for the public good is void. Willemin v. Bates, 63 Mich. 309 (1886); Hawkeye Insurance Co. v. Brainard, 72 Iowa 130 (1887); Brown v. First National Bank, 137 Ind. 655 (1893). Contracts founded on a consideration contrary to the sound principles of public policy will not be enforced. Marshall v. B. & O. R. R. Co., 16 Howard 314 (U. S. 1853); Walsh v. Hibberd, 122 Md. 168 (1913); Standard Fashion Co. v. Grant, 165 N. C. 453 (1914). the law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. The good faith of the parties is immaterial. Elkhart County Lodge v. Crary, 98 Ind. 242 (1884); Woodstock Iron Co. v. Richmond and Danville Extension Co., 129 U. S. 163 (1888). If the contract has not been executed, it will not be enforced; if it has been executed, the law will not give relief. It cannot be rendered valid by invoking the doctrine of estoppel. The law will treat the parties as in *pari delicto,* and leave them where they have placed themselves. Hutchins v. Weldon, 114 Ind. 80 (1887); Robinson v. Patterson, 71 Mich. 141 (1888); Gilchrist v. Hatch, 106 N. E. 696 (Ind. 1914).

CRIMINAL LAW—CONFESSION—VOLUNTARY CHARACTER—After a prisoner suggested that he would "come out and tell the truth," the officer that effected the arrest, said, "It is always best to tell the truth." A confession subsequently made was admitted in evidence. *Held:* The confession was properly admitted. People v. Wilkinson, 198 Pac. 106 (Cal. 1916).

According to the better view the confession in the principal case would have been admissible even if the first suggestion had not come from the prisoner himself. Rex v. Court, 7 C. & P. 486 (Eng. 1836); State v. King, 40 Ala. 321 (1867). But see *contra,* Com. v. Myers, 160 Mass. 530 (1894), where the confession was excluded because the officer merely advised the prisoner that he had better tell the truth. The rule against the admission of confessions unless they are voluntary is founded upon the idea that they are testimonially untrustworthy, and not upon any idea that a wrong would be done the accused in admitting them. Com. v. Dillon, 4 Dal. 116 (Pa. 1792); Regina v. Mansfield, 14 Cox. Cr. 639 (Eng. 1881). The test has accordingly been held to be whether the inducement held out to the prisoner was calculated to make his confession an untrue one. Rex v. Thomas, 7 C. & P. 346 (1836); Tife v. Com., 29 Pa. 437 (1837); U. S. v. Stone, 8 Fed. 232 (1881).

CRIMINAL LAW—MANSLAUGHTER—FAILURE TO PROVIDE MEDICAL ATTENDANCE FOR CHILD—The father of a five-months-old child, knowing that the child was dangerously ill, refused to provide medical attendance for it, under the belief that prayer was all that was necessary; and in pursuance

of this belief he did resort to prayer by himself and others for the child's recovery. The child died. *Held:* The father might be convicted of involuntary manslaughter; verdict, guilty. Commonwealth v. Breth, 44 Pa. C. C. 56 (1916).

The court applied the familiar principle that religious conviction is no excuse for a violation of the law of the land. Perhaps the best example of this principle is shown in the Mormon cases, holding that the practice of polygamy under a religious belief in its necessity is not excusable. Reynolds v. United States, 98 U. S. 145 (1878). So also, working on Sunday, contrary to the statute compelling the observance of Sunday rest, when it was believed that Saturday was the true Lord's day and it was wrong to refrain from work on any other. Speht v. Comm., 8 Pa. 312 (1848), and playing, without a police license, on a musical instrument in a street parade, although done as a matter of religious worship only. Comm. v. Plaisted, 148 Mass. 375 (1889).

The father of an infant child owes him the duty of maintenance and of providing him with the necessities of life, which includes reasonable medical attendance in time of illness; a violation of this duty imposed by law may amount to gross and culpable neglect, and if it results in death, he may be convicted of involuntary manslaughter. Regina v. Downes, 13 Cox C. C. 111 (Eng. 1875); Regina v. Senior, 19 Cox C. C. 219 (Eng. 1898); People v. Pierson, 176 N. Y. 201 (1903); State v. Chenowith, 163 Ind. 94 (1904). On the same state of facts as in the priinciipal case, a conviction of involuntary manslaughter was had in Commonwealth v. Hoffman, 29 Pa. C. C. 65 (1903).

DEBT—SHERIFF'S AMERCEMENT—NEGLECT OF DUTY—A sheriff, by statutory provision, who failed to return a writ of execution within the proper time, could be amerced in the amount of said debt, damages and costs with ten per cent. *Held:* A showing of, or lack of, damages, in a proceeding thereunder was irrelevant and unnecessary. Lee v. Dolan, 158 N. W. 1007 (N. D. 1916).

An amercement, strictly speaking, is a penalty and is a fixed sum, without regard to the extent of the injury suffered by the complaining party, by reason of the default for which it is imposed. 35 Cyc., p. 1885. When the statute is of a penal character, positive and peremptory in imposing an absolute liability, the court has no discretion, but it is their duty to amerce the sheriff, whether his omission results from wilful wrong, or mere neglect, and whether actual damage has been suffered or not. Graham v. Newton, 12 Ohio 210 (1843); Smith v. Martin, 20 Kans. 572 (1878); Cox v. Ploss, 56 Miss. 481 (1879); Henderson-Sturgis Piano Co. v. Smith, 33 Okla. 335 (1912). Some statutes impose a fixed fine, irrespective of the amount of the execution debt, which the courts of those states have rigorously imposed, without the power to dispense or relieve. Brewer v. Elder, 33 Minn. 147 (1885); Swain v. Phelps, 125 N. C. 43 (1899). Other courts on the contrary, construe practically similar statutes to be penal, only when the conduct of the sheriff is shown to have been wilful or corrupt. Shufeldt Co. v. Barlass, 33 Neb. 785 (1892); Allen v. Christensen, 127 N. W. 185 (Minn. 1910). Those courts which require actual damage to entitle the plaintiff

to recover the penalty, place the burden of proof on the sheriff to excuse his failure, and show that he could not have collected anything, had he executed the writ. Coffey v. Wilson, 65 Ia. 270 (1884); Waxahachie Nursery Co. v. Sansom, 138 S. W. 422 (Tex. 1911). So where the judgment debtor had no property liable to execution, no action lay against the sheriff. Swenson v. Christoferson, 72 N. W. 459 (S. D. 1897); Planken v. Jones, 53 S. W. 583 (Tex. 1911).

In Pennsylvania it has been held that it is immaterial that there are no goods on which to levy. Bachman v. Fenstermacher, 112 Pa. 331 (1886). A very few courts draw a distinction between an officer's failure to levy, and a failure to make a return within the specified time, holding that "because of the highly penal character of the statute, its terms should not be extended by construction to cases not within its plain meaning." And therefore the ten per cent. penalty should never be enforced in any case where the execution has been returned, although after the proper date. Bond v. Weber, 17 Kan. 410 (1877); Hawkins v. Taylor, 56 Ark. 45 (1892).

FRAUD—ELEMENTS—RECKLESS STATEMENTS—A vendor in inducing the purchase of a tract of land innocently misrepresented the number of acres. *Held:* Honesty of belief is not a defense in an action for fraud. Schlechter v. Felton, 158 N. W. 813 (Minn. 1916).

The principal case is opposed to the doctrine of Peek v. Derry, 14 Appeal Cases 337 (Eng. 1889), that there must be actual fraud and not merely gross negligence. Under this view the plaintiff must prove *scienter,* or its equivalent. Watson v. Jones, 41 Fla. 241 (1889); Griswold v. Gebbie, 126 Pa. 353 (1889); Colorado Springs Co. v. Wright, 44 Col. 179 (1908); Snyder v. Hemmons, 157 Mo. App. 156 (1910). It has been held that this *scienter* may be proved by showing that the assertion was made as of the defendant's own knowledge so unqualifiedly that it implies actual knowledge. Cabot v. Christie, 42 Vt. 121 (1869); Watson v. Jones, *supra;* Snyder v. Hemmons, *supra;* but in Pennsylvania such proof would be only *prima facie* evidence of deceit. Griswold v. Gebbie, *supra.*

One negotiating a trade, is held, by some courts, bound to know and cannot assert to be true that which he does not know. Prestwood v. Carlton, 162 Ala. 327 (1909); Katham v. Comstock, 140 Wis. 427 (1909). He cannot, by his recklessness, cast upon the vendee the duty of measuring the land, but the latter may rely on the former's statements. Ledbetter v. Davis, 121 Ind. 119 (1889); Selby v. Matson, 137 Ia. 97 (1908); Wasterman v. Corder, 86 Kan. 239 (1912). In most states the vendor is liable even though he has pointed out the boundaries, Ledbetter v. Davis, *supra;* Griswold v. Gebbie, *supra,* though it has been held that the duty of inspection rests on the vendee. Gordon v. Parmelee, 2 Allen 212 (Mass. 1861). A few jurisdictions hold the declarant liable even though the representation is entirely innocent, if he is a party to the contract. Aldrich v. Scribner, 154 Mich. 23 (1908).

EVIDENCE—WIFE OF ACCOMPLICE—CORROBORATION—In a prosecution for larceny the evidence of one of the several accomplices was corroborated by the wife of another accomplice who was not called. The wife was in no

way connected with the crime. *Held:* The evidence was admissible as corroboration despite the fact that it in turn was not corroborated by an independent witness. Rex v. Willis, 114 L. T. 1047 (Eng. 1910).

The general rule regarding the testimonial source of the corroboration necessary to the evidence of an accomplice is, that it must be independent of the accomplice himself, and must rest on other than his credit. Hannehan v. State, 7 Tex. App. 664 (1880). Although it was formerly the rule in England, that the testimony of an accomplice's wife is insufficient, Rex v. Neal, 7 C. & P. 168 (Eng. 1835), the contrary is the rule in the majority of the states authorities and as shown in the principal case, is the modern English view. Rex v. Wilson, 6 C. A. R. 125 (Eng. 1911); Rex v. Blatherwick, 6 C. A. R. 281 (Eng. 1911); State v. Moore, 25 Iowa 128 (1868); Woods v. State, 76 Ala. 35 (1884). In no jurisdiction is the testimony of an accomplice alone sufficient. Rex v. Noates, 5 C. & P. 526 (Eng. 1832); Porter v. Com., 61 S. W. 16 (Ky. 1901). Peculiar circumstances may, however, render it sufficient in certain cases, as where the prisoners have been separately confined, Rex v. Aylmer, 1 Cr. & D. 116 (Eng. 1839), or have had "no opportunity of being together to prepare a uniform story," State v. Williamson, 42 Conn. 261 (1875). The sufficiency of the corroboration is for the jury, but its existence is a question of law for the court. People v. O'Farrell, 175 N. Y. 323 (1903); Stone v. State, 45 S. E. 630 (Ga. 1903).

LIBEL—FAIR COMMENT—A newspaper published a report of a meeting of the school board at which it appeared that the contractor's estimates for enlargements were double those of the board's architect who had an exclusive right to design the enlargements. The comment was that "the rule is an absurdity and puts a premium upon a certain kind of advice." *Held:* The criticism is only on the architect as a public servant and as such is not libellous. Leng & Co. v. Langlands, 114 Law Times 665 (Eng. 1916).

The right of newspapers and the public generally to criticize and comment upon matters of public interest and the conduct of public officers is generally conceded, both in England and America. Henwood v. Harrison, L. R. 7 C. P. 606 (Eng. 1872); Miner v. Detroit Post & Tribune Co., 49 Mich. 358 (1882); Cook v. Pulitzer Publishing Co., 241 Mo. 320 (1912); Ott v. Murphy, 141 N. W. 463 (Iowa 1913). The right does not include the making of statements, otherwise libelous, 11 App. Cases 187 (Eng. 1886); Neet v. Hope, 111 Pa. 145 (1886); Burt v. Advertiser Newspaper Co., 154 Mass. 238 (1891); Hallam v. Post Publishing Co., 55 Fed. 456 (1893), nor can the publisher escape liability if his comment was in fact malicious, and made merely for the purpose of injuring the one about whom the comments are made. Henwood v. Harrison, *supra;* Malone v. Carrico, 16 Ky. Law Rep. 155 (1894). So also, comment on the private character of public men, except as it affects their fitness for carrying out the duties of their office, or on facts which are false, though not known so to be, are libellous. Post Publishing Co. v. Maloney, 50 Ohio St. 71 (1893); Wood v. Boyle, 177 Pa. 620 (1896); Clifton v. Lange, 108 Iowa 472 (1899); Parsons v. Age-

Herald Publishing Co., 61 So. 345 (Ala. 1913); Kutcher v. Post Printing Co., 147 Pac. 517 (Wyo. 1915).

The comment must be fair and reasonable and must not go further than the occasion warrants. Evening Post Co. v. Richardson, 113 Ky. 641 (1902); Starks v. Comer, 67 So. 440 (Ala. 1914); Williams v. Hicks Printing Co., 159 Wis. 90 (1914). Whether the comment is privileged is a question of law for the court; whether it is fair and reasonable is a question for the jury. Evening Post Co. v. Richardson, 113 Ky. 641 (1902); Parsons v. Age-Herald Publishing Co., *supra.*

The principal case is a clear exposition of most of the principles of law stated above, and is in accord with the great weight of authority on this subject.

LIBEL—WORDS LIBELOUS *Per Se*—The defendant, a newspaper company, published a story to the effect that the mayor of the city, having taken offense at a certain lecture, ordered the city marshal to arrest the lecturer, and the marshal having refused to do so, had caused the fire department to be called out and water to be thrown upon the audience. *Held:* The words were libelous *per se.* Atlanta Journal Co. v. Pearce, 89 S. E. 759 (Ga. 1916.)

The rule is well settled that words which tend to expose a person to public hatred, contempt or ridicule are actionable as being libelous *per se.* Cohen v. N. Y. Times Co., 132 N. Y. S. 1 (1911).

In respect to public officers, it is libelous *per se* to publish anything which imputes want of integrity, or a lack of qualification, or a dereliction of duty. Neeb v. Hope, 111 Pa. 145 (1885); O'Shaughnessy v. N. Y. Recorder Co., 58 Fed. 653 (1893); Kutcher v. Post Printing Co., 147 Pac. 517 (Wyo. 1915). But the libel must be published about the person while he is in office. Edwards v. Howell, 32 N. C. 211 (1849). It must touch him in respect to the office. Kinnev v. Nash, 3 N. Y. 177 (1849). And it must impute the lack of some duty which he was bound to do. Westbrook v. N. Y. Sun Ass'n, 65 N. Y. S. 399 (1900). Of course, if the publication is libelous *per se* without reference to the office, the holding of office at the time is immaterial. Russel v. Anthony, 30 Am. Rep. 436 (Kan. 1879); Callahan v. Ingram, 26 S. W. 1020 (Mo. 1894).

Where the libeled person was a mayor, as in the principal case, it has been held libelous *per se* to refer to him as an "imp of the devil," Price v. Whitily, 50 Mo. 439 (1872), or to charge that he allowed a dive to remain open. Kutcher v. Post Pub. Co., *supra.* On the other hand, it is not libelous *per se* to charge a lack of duty on the part of a volunteer citizens' committee. Dawson v. Baxter, 42 S. E. 456 (N. C. 1902). Nor to publish that the mayor was running the town without reference to council or the people. Denver v. Montgomery, 132 Pac. 183 (Kan. 1913).

Where the publication charges something which is a usual incident of politics, it will not be considered actionable. Lydiard v. Wingate, 155 N. W. 212 (Minn. 1915). Nor will the use of slang phrases, nor the appearance of slight inaccuracies, make the publication libelous *per se.* Addington v. Times Pub. Co., 70 South 784 (La. 1916).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT—EFFECT OF PRE-EXISTING DISEASE—The claimant had been suffering from heart disease. The disease was so accelerated by a muscular exertion during her work that she was totally incapacitated. The same exertion would not have injured a normally healthy person; nor would the character of the disease, acting alone or progressing as it would under normal work, be sufficient to cause the disablement. *Held:* Claimant suffered a personal injury arising out of and in the course of the employment; she is therefore entitled to compensation for total disability, nor is there to be any apportionment of the award on account of the prior illness of the claimant. *In re* Madden, 111 N. E. 379 (Mass. 1916).

The case holds that the muscular exertion necessary in the work done by the complainant was the contributing proximate cause of the injury. Therefore, there is the necessary causal connection between the work and the injury, for the injury to "arise out of and in the course of the employment." McNicol's Case, 215 Mass. 497 (1913). The case is important in that it holds that the full protection of the act is to be extended to all employees, regardless of their physical condition at the time of the "accident," provided that the work is the proximate cause of the injury, which may be but an acceleration of the pre-existing disease. The situation has been productive of much discussion from the standpoint of the fundamental jurisprudence of workmen's compensation acts. See "Consequences of Accidents under Workmen's Compensation Laws," by P. Tecumseh Sherman, in 64 UNIV. OF PENNA. L. REV. 417; and Carrol v. Stables Co., 96 Atl. 208 (R. I. 1916), annotated in 64 UNIV. OF PENNA. L. REV. 624. Both Mr. Sherman's article and the annotation contain citations of the leading cases and other authorities.

MUNICIPAL CORPORATIONS—TORTS—DUTY TO ERECT BARRIERS ALONG STREETS—A motor car plunged over a high embankment which bordered a city boulevard, there being no protecting railing of any sort. *Held:* The municipal corporation was liable. Briglia v. City of St. Paul, 158 N. W. 795 (Minn. 1916).

The general rule is well settled that a city is bound to maintain its streets in a reasonably safe condition for ordinary use by erecting barriers, *etc.* This duty is limited to care of the streets only. Hutchison v. Town of Summerville, 66 S. C. 442 (1903); Gingles v. City of Rock Island, 217 Ill. 185 (1905); Prather v. City of Spokane, 29 Wash. 549 (1902). The protection required tends more towards its adequacy as notice of a danger than as an absolute protection. Stickney v. City of Salem, 85 Mass. 374 (1862); Brophy v. City of Chicago, 79 Ill. 277 (1875). This protection must be properly placed. Kaner v. City of Detroit, 142 Mich. 331 (1905).

Where the risk requires barriers they must be maintained in effectual condition. If, after proper erection of suitable barriers, they are removed or destroyed by third persons, liability ceases unless the city knows or should know by lapse of time that the barrier erected has become ineffectual. Myers v. City of Kansas, 108 Mo. 480 (1891); Welsh v. City of Lansing, 111 Mich. 589 (1897). Fox v. City of Chelsea, 171 Mass. 297 (1898). So

where the city knows that the barrier will be removed by trolley crews to let trolleys pass, it will be responsible for the proper maintenance of the barrier by watchman or otherwise, Prentiss v. City of Boston, 112 Mass. 43 (1873).

It has been held that a city is liable for dangerous defects in its streets created under a permit to open the street unless the party so acting has himself put up a reasonable protection of barriers, Blessington v. City of Boston, 153 Mass. 409 (1891); Walker v. City of Ann Arbor, 111 Mich. 1 (1896), even where statute obliges such party to repair and protect. Hyde v. City of Boston, 186 Mass. 115 (1904).

The rule laid down in Briglia v. City of St. Paul, *supra*, limiting duty of municipal corporations to erect barriers to the actual street find support in Ray v. City of St. Paul, 40 Minn. 458 (1889), and Seewald v. Schmidt, *et al.*, 127 Minn. 375 (1914), but in Kinney v. City of Tekemah, 30 Neb. 605 (1890); Addison v. City of Elwood, 26 Ind. App. 28 (1901); Baker v. City of Chicago, 195 Ill. 54 (1902); Earl v. City of Cedar Rapids, 126 Iowa 361 (1905); Spees v. City of Vincennes, 35 Ind. App. 389 (1905), the rule is broader and includes dangerous localities adjacent to the street.

The duty only arises by statutory command and its scope is generally limited by the statutes creating it. Sutton v. City of Snohomish, 11 Wash. 24 (1895); Wentworth v. Pittsfield, 73 N. H. 359 (1905).

There is a tendency in several jurisdictions to limit this duty to protect street defects and dangers by barriers, danger lights, *etc.*, to a minimum and to decide as a matter of law that the risk was too slight to raise any duty, or the protection afforded was adequate, wherever the evidence gives any opportunity to so rule, Lineburg v. City of St. Paul, 71 Minn. 245 (1898); Martin v. City of Chelsea, 175 Mass. 516 (1900); Thins v. City of Vincennes, 28 Ind. App. 523 (1902); Bohl v. City of Dell Rapids, 15 S. D. 619 (1902); Watson v. City of Duluth, 128 Minn. 446 (1915); but see also Newman v. City of Ann Arbor, 134 Mich. 29 (1903).

PROPERTY—ADVERSE POSSESSION—MISTAKE AS TO BOUNDARY—In making a conveyance, a grantor pointed out land as included in the deed when in fact it was not. The grantee occupied all the land, intending to claim only to the true boundary. *Held:* Title by adverse possession was acquired. Pease v. Whitney, 98 Atl. 62 (N. H. 1916).

There are two lines of decisions as to whether one who holds land by mistake, has adverse possession. The principal case is *contra* to the weight of authority, that possession by mistake is not adverse. Preble v. Maine Cent. R. R., 27 Atl. 149 (Me. 1893); Griffin v. Brown, 149 N. W. 833 (Iowa 1914). If, however, the intent is to hold the land at all events, the statute runs, regardless of any mistake as to boundary. Wilson v. Husted, 59 Ark. 626 (1894). But the claim must be as broad as the possession. Dolittle v. Bailey, 85 Iowa 398 (1892). In the absence of intention to hold adversely, the presumption is that the claimant intended to hold to the true line only. Tann v. Kellogg, 49 Ala. 118 (1871). The rule does not apply to the grantees of persons who occupied by mistake part of their neighbor's land, because it could not be supposed that they did not intend to claim the lands they purchased. Otis v. Moulton, 20 Me. 205 (1841).

The minority rule is that the possession and the claiming of the land as one's own constitutes adverse possession regardless of the claimant's guilt or innocence. French v. Pearce, 8 Conn. 439 (1831); Williams v. Hewitt, 164 S. W. 1198 (Tenn. 1914). If, however, two adjoining landowners agree that a fence is not on the true line and that they will allow the fence to stay for convenience, the possession is not adverse but permissive. Russel v. Maloney, 39 Vt. 579 (1867); Small v. Hamlet, 24 Ky. 238 (1902).

All jurisdictions agree that if, by mistake one claims an estate less than a fee, the statute will not run. Bond v. O'Gara, 58 N. E. 275 (Mass. 1900). A claim of a life estate, with a remainder in fee, is the claim of a fee. Hanson v. Johnson, 5 Am. Rep. 199 (Md. 1884).

The southern and western states favor the majority rule, Skauski v. Novak, 146 Pac. 160 (Wash. 1915); Mobile & G. R. Co. v. Rutherford, 63 So. 1003 (Ala. 1913), but see Jasperson v. Scharnikow, 150 Fed. 571 (Wash. 1907).

The early Pennsylvania cases followed the majority rule, Comegys v. Carley, 3 Watts 280 (Pa. 1834); Brown v. McKinney, 9 Watts 565 (Pa. 1840), but the later cases are *contra*. Kuhns v. Fennell, 3 Atl. 920 (Pa. 1885); Culbertson v. Duncan, 13 Atl. 966 (Pa. 1888); Reiter v. McJunkin, 173 Pa. 82 (1896); Farr v. Mullen, 5 L. L. N. 318 (Pa. 1899).

PUBLIC OFFICER—BRIBERY—A candidate for county judge promised in his campaign that, if elected, he would accept less than the salary legally due. There was no evidence that any voter was influenced by these promises. *Held:* The promises were illegal and disqualified the defendant from holding the office. Prentiss v. Dittmer, 112 N. E. 1021 (Ohio 1916).

The rule of the principal case is firmly established by the eleven cases found in which the question has arisen concerning such promises to accept less than the legal salary. Gloucester Case, Reports of Controverted Election Cases by Cushing, *et al.*, 97 (Mass. 1810); State *ex rel.* v. Purdy, 36 Wis. 213 (1874), citing Gloucester case, *supra;* State *ex rel.* v. Church, 5 Ore. 375 (1875); Carrothers v. Russel, 53 Ia. 346 (1880); State *ex rel.* v. Collier, 72 Mo. 13 (1880); People *ex rel.* v. Thornton, 60 How. Pr. 457 (N. Y. 1881); State *ex rel.* v. Humphreys, 74 Lex. 466 (1889); State *ex rel.* v. Elting, 29 Kan. 397 (1893); State *ex rel.* v. Bunnel, 131 Wis. 198 (1907); Bush v. Head, 154 Cal. 277 (1908); Diehl v. Totten, 155 N. W. 74 (N. D. 1915). The basic reason of these cases for declaring such promises illegal is because the practice tends to giving the offices "not to those who are most able to execute them but to those who are most able to pay for them." Tucker v. Aiken, 7 N. H. 113 (1834).

There is, however, a difference of opinion as to whether the promise alone is sufficient to invalidate the election. Six cases, in accord with the principal case, declared the defendant's election void. Gloucester Case; Carrothers v. Russel; People *ex rel.* v. Thornton; State *ex rel.* v. Elting; Bush v. Head; and Diehl v. Totten; *supra*. The other cases hold that in order to disqualify the defendant it must be shown that it was the illegal votes as influenced or induced by the promises which elected him. State *ex rel.* v. Purdy; State *ex rel.* v. Church; State *ex rel.* v. Collier; State *ex*

*rel.* v. Humphries; State *ex rel.* v. Bunnel, *supra,* and People *ex rel.* v. Thornton, 25 Hun 456 (N. Y. 1881), reversing on this point People *ex rel.* v. Thornton, *supra.*

RAPE—COERCION—THREAT OF ARREST—The prosecutrix testified that the defendant, who intimated that he was an officer, threatened her with arrest if she would not consent to the act of intercourse. It was uncertain whether the threat was made before or after the act. *Held:* It was error not to charge that the mere threat to arrest would not be a threat to use such force and violence. State v. Cavanaugh, 158 Pac. 1053 (Cal. 1916).

It is well settled that to constitute the crime of rape, there must be the use of force, and the act must be done without the consent, or against the will, of the female. The force, however, need not be actual, but may be constructive or implied; and constructive force is defined as acquiescence gained through duress or fear. McNair v. State, 53 Ala. 453 (1875); Shepherd v. State, 33 So. 266 (Ala. 1903). It has been held that the threat which compels acquiescence must be a threat of death or bodily harm. Montoza v. State, 185 S. W. 6 (Texas 1916). The female need not necessarily be under the apprehension of death, in order to constitute the crime. Waller v. State, 40 Ala. 325 (1867). A threat of future harm is not sufficient to make the consent void, it must be a threat of immediate personal injury. People v. Crosby, 120 Pac. 441 (Cal. 1911).

It has been held that rape may be committed without the use of physical force or violence, but a charge which refers the submission to the "force of surrounding circumstances" is too vague and indefinite. King v. Commonwealth, 20 S. W. 224 (Ky. 1892). One court has said that the use of the word "force" has reference solely to the will of the female, Darrell v. Commonwealth, 88 S. W. 1060 (Ky. 1905), and the crime is rape if accompanied by an array of physical force, so that the female dared not resist, even if the defendant lay no hand on her. Doyle v. State, 22 So. 272 (Fla. 1897). Thus, it was held to be rape where a child just over fourteen consented to intercourse with her father, at his command. State v. Dawson, 70 S. E. 721 (S. C. 1911).

TORTS—INJURY TO TRESPASSER—UNLICENSED AUTOMOBILE—An unregistered automobile was being driven on a public highway wnen, because of a negligently maintained and defective bridge, it was wrecked and the owner driving it injured. *Held:* The statute prohibits the use of an unregistered automobile and therefore such use is a trespass against which towns are not bound to keep the ways safe. McCarthy v. Inhabitants of Leeds, 98 Atl. 72 (Me. 1916).

Excepting the "attractive nuisance" or "turntable cases" doctrine, the rule is well established that a person owes no duty towards trespassers or wrongdoers except to refrain from wilful and wanton injury or active negligence. Sweeney v. Old Colony and Newport Railroad, 10 Allen 368 (Mass. 1865); Bottum's Adm. v. Hawks, 84 Vt. 370 (1911); Shawnee v. Cheek, 142 Pac. 346 (Okla. 1913); Wilmes v. Railway Co., 156 N. W. 877 (Ia. 1916). There is, however, authority for the rule that it is not a sufficient defense to show merely that the plaintiff was a wrongdoer, trespasser, or violator

of the law. Kerwacher v. Cleveland, *etc.*, Railroad, 3 Ohio St. 172 (1854); Norris v. Litchfield, 35 N. H. 271 (1857); Isbell v. N. Y. & N. H. Railroad, 27 Conn. 393 (1858). See also Lovett v. Railroad Co., 9 Allen 557 (Mass. 1865).

The principle regarding trespassers is applied to the situation of the principal case. The Massachusetts courts are in accord. Dudley v. Railway Co., 202 Mass. 443 (1909). See also Tackett v. Taylor County, 123 Ia. 149 (1904). But the principle does not apply where the driver of the machine is unlicensed. Bourne v. Whitman, 209 Mass. 155 (1911).

Where, however, the statute does not prohibit the use of the highways by unlicensed automobiles but merely provides a penalty, it is generally held that there can be a recovery unless the defendant shows some causal connection between the illegal act and the injury. Hemming v. New Haven, 82 Conn. 661 (1910); Railroad Co. v. Wier, 63 Fla. 69 (1912); Birmingham, *etc.*, Co. v. Aetna Co., 184 Ala. 601 (1913); Lockbridge v. Railway Co., 161 Ia. 74 (1916). Some courts, likewise, *contra* to the principal case, require a causal connection between the injury and the illegal act when the statute expressly prohibits the use of unlicensed machines. Lindsay v. Cecchi, 80 Atl. 523 (Del. 1911); Hyde v. McCreery, 145 App. Div. 729 (N. Y. 1911); Armstead v. Loudensberry, 129 Minn. 34 (1915). See also Crossen v. Railway Co., 158 Ill. App. 42 (1910), and Shaw v. Thielbahr, 82 N. J. L. 23 (1911).

TORTS—LIABILITY FOR ACCIDENT FROM FIREWORKS AT A CELEBRATION—A small child was seriously injured by the explosion of a bomb on his father's premises where it had fallen, unexploded, during a fireworks display given nearby. *Held:* The promoters of a display that may become a nuisance by reason of the manner and place in which it is conducted are liable for resulting personal injuries. Sroka v. Halliday, *et al.*, 97 Atl. 965 (R. I. 1916).

The law demands the highest degree of care in the custody of explosives. McAndrews v. Collerd, 42 N. J. Law 189 (1880); Laflin-Rand Powder Co. v. Tearney, 23 N. E. 389 (Ill. 1890); Rudder v. Koopman, 22 So. 601 (Ala. 1897), and is especially exacting as respects young children. Pittsburg, *etc.*, Ry. Co. v. Shields, 24 N. E. 658 (Ohio 1890); Mattson v. Minnesota & N. W. R. Co., 104 N. W. 443 (Minn. 1905); Wells, *et al.* v. Gallagher, 39 S. 747 (Ala. 1905). This requirement particularly applies where explosives from a fireworks display fall, unexploded, upon public or private grounds and are permitted to remain there and be discharged by children and persons unacquainted with their dangerous nature. Bianki v. Greater American Exposition Co., *et al.*, 92 N. W. 615 (Neb. 1902).

Where children find unguarded explosives they are not guilty of contributory negligence when injuries result. Powers v. Harlow, 19 N. W. 257 (Mich. 1884); Olson v. Gill Home Investment Co., 108 Pac. 141 (Wash. 1910); *contra,* Afflick v. Bates, 43 Atl. 539 (R. I. 1899), where the act of a boy in exploding a cap found in an exposed tool chest was considered as the proximate cause of the injury. Merely being present at and observing a display of fireworks is not contributory negligence in one injured by their discharge. Bradley v. Andrews, 51 Vt. 530 (1879); Dowell v. Guthrie, 12 S. W. 900 (Mo. 1889); Colvin v. Peabody, 29 N. E. 59 (Mass. 1891).

All persons setting off fireworks in a public street contrary to municipal laws are responsible for injuries done to innocent persons and their property. Conklin v. Thompson, 29 Barb. N. Y. 218 (1859); Jenne v. Sutton, 43 N. J. Law 257 (1881); *contra,* with strong dissent, Scanlon v. Wedger, 31 N. E. 642 (Mass. 1892), where voluntary spectators were denied recovery for injuries caused by fireworks not negligently discharged.

Where the display is not unlawful, or a nuisance, *per se,* spectators injured by bombs, falling rockets, *etc.,* can recover for negligence of the promoters in using improperly made explosives and in carelessly and unsuitably discharging them. Colvin v. Peabody, *supra;* Bianki v. Greater American Exposition Co., *et al., supra;* Crowley v. Rochester Fireworks Co., 76 N. E. 470 (N. Y. 1906); but see *contra,* Sebeck v. Plattdeutsche Volksfest Verein, 124 Fed. 11 (1903), where no care as to the quality of the explosives and the manner of their discharge, but only precautions as to distance of the spectators from the discharging place, were considered necessary.

TORT—NEGLIGENCE—THEATRE—A theatre patron, injured as a result of the careless loading and handling of a pistol by a member of a traveling company, brought suit against the owner of the theatre. *Held:* Such owner is liable even though the actor was the servant of the manager of the traveling company. Cox v. Coulston, 114 L. T. R. 599 (1916).

Although a theatre patron is merely a licensee, and the extent of the rights conferred by a theatre ticket, are to be determined by the rules applicable to licenses generally. Collister v. Hayman, 183 N. Y. Ct. of App. 250 (1905); Boswell v. Barnum-Bailey, 185 S. W. 692 (Tenn. 1916). Yet as such licensee, he is to be protected from harm while in the enjoyment of this license. Sec. 124, J. A. Brackett's "Theatrical Law," p. 136. In England, the proprietor of a music hall has been held responsible for the acts of an independent performer, on the theory of an implied contract that spectators should be safe. Welsh v. Canterburg-Paragon, 10 T. L. R. 478 (1894). And though the manager, or owner of a place of amusement, is not an insurer of the safety of his patrons, yet his duty is to exercise reasonable care to that end. Sebeck v. Plattdeusche Volkfest Verein, 64 N. J. L. 624 (1900). New Theatre Co. v. Hartlove, 123 Md. 78 (1914). Especially to protect against incidents arising from the production of a play intrinsically dangerous. Plaskot v. Benton-Warren Agri. Soc., 89 N. E. 968 (Ind. 1909). The fact that the exhibition was by an independent contractor does not relieve the proprietor from responsibility, if it were of such a nature, likely to cause injury to a spectator, unless due precautions to guard against harm were taken. Thompson v. Lowell St. Ry. Co., 170 Mass. 577 (1898); Richmond Co. v. Moore's Adms., 94 Va. 493 (1897). Such as the negligent operation of a spotlight. Thomas v. Springer, 134 N. Y. App. 640 (1909). This has been applied in those cases where the proprietor of the theatre receives a percentage of the admissions; he is responsible for the condition of all apparatus and devices used by the concessionary, there being an implied representation on his part, that the instruments used in the advertised amusement are reasonably safe. Texas State Fair v. Britain, 118 Fed. 713 (Tex. 1902); Thornton v. Maine State Agri. Soc., 97 Me. 108 (1902); Stickel v. Riverview Sharpshooters Park Co., 250

Ill. 452 (1911). In some cases the doctrine, *res ipsa loquitur,* has been applied and the duty of the manager has been carried to an extreme point. Wodnik v. Luna Park Co., 125 Pac. 941 (Wash. 1912).

The holding in the principal case is followed in Pennsylvania. Fox v. Dougherty, 2 W. N. C. 417 (Pa. 1876), and its application seems practically universal. A good review of all the cases on the subject is cited in Hartmann v. Tennessee State Fair Ass'n, 183 S. W. 733 (Tenn. 1916).

TORTS—STREET RAILWAYS—DEGREE OF CARE NECESSARY—Where a negligent driver was struck in crossing the street car tracks it appeared that the collision might have been avoided had the motorman brought the car under control as soon as he saw the wagon start across the tracks. *Held:* The street car company is liable. Stewart v. Metropolitan Street Railway Company, 188 S. W. 198 (Mo. 1916).

It is the general rule that a street railway company is bound to exercise ordinary or reasonable care to avoid collisions with vehicles or pedestrians rightfully on its tracks, and to keep a lookout for persons who may be approaching the track. Beers v. Housatonic R. R. Co., 19 Conn. 566 (1849); Baltimore Traction Co. v. Wallace, 77 Md. 435 (1893); Indianapolis Street Ry. Co. v. Seerley, 35 Ind. App. 467 (1904); Rapp v. Transit Co., 190 Mo. 144 (1905).

"Ordinary care" as used in these cases has been defined by the Washington Supreme Court as "that degree of care which men of ordinary prudence and skill engaged in like work, would exercise under similar circumstances." Keefe v. Seattle Electric Co., 104 Pac. 774 (Wash. 1909).

Consequently, it has been held, a greater degree of care is required to prevent injuries to children than with regard to the safety of adults. Passamaneck's Admr. v. Louisville Ry. Co., 98 Ky. 195 (1895); Woeckner v. Erie Electric Motor Co., 176 Pa. 451 (1896). This also applies to cripples and persons in peril from which they are unable to extricate themselves. Baltimore Traction Co. v. Wallace, 77 Md. 435 (1893), *supra;* South Chicago City Ry. Co. v. Kinnare, 96 Ill. App. 210 (1901). On the other hand, the railway company owes no duty to a trespasser to look out for him until his danger has actually been discovered, unless there is reason to expect that there may be persons on the track. Levelsmeier v. St. Louis & Suburban Ry. Co., 114 Mo. App. 412 (1905); Birmingham Ry., Light & Power Co. v. Jones, 153 Ala. 157 (1907). Where the negligence of the person injured was the cause of the injury, no recovery can be had. Graff v. Detroit Citizens' R. Co., 109 Mich. 77 (1896); Brown v. Pittsburg, *etc.,* Traction Co., 14 Pa. Super. Ct. 594.

But under the doctrine of the "last clear chance" even though the person injured was negligent, if the motorman by the exercise of ordinary care after the danger is, or ought to have been, observed, might have avoided the collision, he is not precluded from recovery. Owenboro City Ry. Co. v. Hill, 56 S. W. 21 (Ky. 1900); Indianapolis Street Ry. Co. v. Seerley, 35 Ind. App. 467 (1904), *supra;* Ft. Smith Light & Traction Co. v. Barnes, 80 Ark. 169 (1906). This doctrine also applies to trespassers. Floyd v. Paducah Ry. & Light Co., 73 S. W. 1122 (Ky. 1903).

In some jurisdictions it is not sufficient that the motorman by the exercise of reasonable care might have become aware of the dangerous position of the party injured in time to avoid striking him, but actual knowledge is essential to relieve persons injured from the effects of their own negligence. Johnson v. Stewart, 62 Ark. 164 (1896); Siek v. Toledo Consolidated Ry. Co., 160 Ohio C. C. 393 (1898); Austin Dam & Suburban Ry. Co. v. Goldstein, 18 Tex. Cir. App. (1898).

TRADE NAMES—DESCRIPTIVE NAMES—The manufacturer of a preparation called "malted milk" sought to enjoin the manufacture and sale of a somewhat similar preparation called "Hedley's Malted Milk." *Held:* "Malted milk" was descriptive and had never become distinctive of the Horlick make. Horlick's Malted Milk Co. v. Summerskill, 114 L. T. Rep. 484 (Eng. 1916).

Any words, letters, figures, marks, or devices, or combinations of any of these, affixed to a commercial article and used primarily to indicate origin or ownership is a valid trade-mark but there must be more than the mere employment of the combination to designate quality or ingredients, or to serve solely as a geographical name without any secondary signification. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 62 Atl. 499 (Me. 1905). The test whether a word to the exclusive use of which a trader was originally entitled has become *publici juris,* is whether its use by others is calculated to deceive the public. Ford v. Foster, 27 L. T. Rep. 219 (Eng. 1872).

Words used adjectively or as laudatory epithets do not entitle the user to a monopoly, *e. g.,* "Cellular," Cellular Clothing Co. v. Maxton & Murray, 80 L. T. Rep. 809 (Eng. 1899); "Flare Front," Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 939 (1908); "Orlwoola," appealing more to the ear than to the eye and not distinctive, *Re* H. N. Brock & Co., Ltd., 101 L. T. Rep. 587 (Eng. 1910); and "Perfection," *Re* Crossfields & Sons, Ltd., 101 L. T. Rep. 587 (Eng. 1910). Some words when standing alone do not indicate origin and manufacture but in association with other words have that effect and become trade names: "Crown," "Jamestown," Virginia Baking Co. v. Southern Biscuit Works, 68 S. E. 261 (Va. 1910). Others of themselves are distinctive: "Stone Ale," Montgomery v. Thompson, *et al.,* 64 L. T. Rep. 748 (Eng. 1891); "Yorkshire Relish," Birmingham Vinegar Brewing Co. v. Powell, 76 L. T. Rep. 792 (Eng. 1897); "Sunshine Stoves," Reading Stove Works, *etc.,* v. S. M. Howes Co., 87 N. E. 751 (Mass. 1909); "California Syrup of Figs," *Re* California Fig Syrup Co., Ltd., 101 L. T. Rep. 587 (Eng. 1910).